

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF SOUTH DAKOTA

3 SOUTHERN DIVISION

4 \* \* \* \* \*

5 Civ. 04-04200

6 DONALD E. MOELLER,

7 Plaintiff,

8 -vs-

9  
10 DOUGLAS WEBER, Warden,  
11 South Dakota State Penitentiary,

12 DENNIS KAEMINGK, Acting Secretary  
13 in His Official Capacity as  
Secretary of Corrections,

14 DOES 1-20, Unknown Employees or Agents  
15 of South Dakota Department of Corrections,

16 Defendants.

17  
18 U.S. District Courthouse  
19 Sioux Falls, SD  
20 October 4, 2012  
1:30 o'clock p.m.

21 \* \* \* \* \*

22 H E A R I N G

23 \* \* \* \* \*

24 BEFORE: The Honorable Lawrence L. Piersol  
U.S. District Court Judge  
Sioux Falls, SD  
25

1 APPEARANCES:

2 Mr. Scott W. Braden  
3 Ms. Jennifer L. Molayem  
4 Federal Public Defender's Office (Arkansas)  
5 1401 W. Capitol Avenue, Suite 490  
6 Little Rock, AR 72201

7 -and-

8 Mr. Mark F. Marshall  
9 Bangs, McCullen, Butler, Foye & Simmons  
10 PO Box 2670  
11 Rapid City, SD 57709

12 for the Plaintiff

13 Mr. Marty J. Jackley  
14 Mr. Paul S. Swedlund  
15 Ms. Sherri Sundem Wald  
16 Attorney General of South Dakota  
17 1302 E. Highway 14 Suite 1  
18 Pierre, SD 57501-8501

19 for the Defendants

20 ALSO PRESENT: Donald E. Moeller  
21  
22  
23  
24  
25

INDEX TO EXHIBITS

OFFERED

RECEIVED

Exhibit A

p. 23

(Letter from Tonya Willingham to Donald Moeller, 8-14-12,  
with envelope)

Exhibit B

p. 24

(Postcard from Tim to Donald Moeller, 2-17-12)

1 THE COURT: Good afternoon. This is the case of  
2 Donald Moeller, Plaintiff, vs. Douglas Weber, Warden of the  
3 South Dakota State Penitentiary, Douglas Kaemingk. Am I  
4 pronouncing that right?

5 MR. SWEDLUND: Kaemingk.

6 THE COURT: Kaemingk. All right. Acting  
7 Secretary in his Official Capacity as Secretary of  
8 Corrections, and Does 1 through 20.

9 First of all, I'll take appearances. First, for the  
10 Plaintiff, Petitioner.

11 MR. MARSHALL: Mark Marshall on behalf of  
12 Donald Moeller, Your Honor.

13 MR. BRADEN: Scott Braden for Don Moeller,  
14 Your Honor.

15 MS. MOLAYEM: Jennifer Molayem for Donald  
16 Moeller.

17 THE COURT: Then for the State?

18 MR. JACKLEY: Marty Jackley, Paul Swedlund, and  
19 Sherri Wald on behalf of the Attorney General's Office, as  
20 well as Douglas Weber, Warden of the Penitentiary.

21 THE COURT: Well, when the Court first scheduled  
22 this hearing, it set forth the issues it wanted to argue,  
23 and then in addition to that, any other argument counsel  
24 wanted to make. I wanted to make sure we covered issues I  
25 particularly wanted to hear in the order I wanted to hear

1     them. Then after that there will be a variety of other  
2     things to hear argument on.

3             But after I entered that Order, then the Motion to  
4     Dismiss this lawsuit challenging the method of execution  
5     was filed by Attorney Marshall on behalf of Donald Moeller.  
6     Attorney Marshall is counsel of record for Mr. Moeller in  
7     the State Court proceedings, the criminal proceedings that  
8     have ultimately resulted in the case being here.

9             I want to point out, just in terms of setting the  
10    stage, that the habeas corpus portion of this case is done.  
11    Guilt has been finally determined, because the Eighth  
12    Circuit Court of Appeals affirmed this Court's decision,  
13    which denied habeas corpus relief. The United States  
14    Supreme Court denied certiorari.

15            This Court separated the method of execution issue  
16    from the habeas corpus action, so that the habeas corpus  
17    proceedings could go ahead.

18            What is left then that's before the Court now is the  
19    Civil 1983 claims regarding method of execution. That's  
20    what the Court was going to hear argument on today when it  
21    initially entered the Order.

22            So just so everybody is clear, this is not a lawsuit  
23    about whether or not Mr. Moeller will be executed. This  
24    lawsuit is about how Mr. Moeller will be executed, and when  
25    the execution will take place as it's now set by the State

1 Court, or whether it will have to be at some later date,  
2 which would also ultimately then be set by the State Court.

3 Now, there have been a lot of filings. I'm not  
4 critical of anybody about that. But just so we see where  
5 we are, there have been, for instance, at 11:10 today the  
6 Court received a Motion from Arkansas counsel for  
7 Mr. Moeller to strike untimely exhibits. That's Document  
8 360. With the way things have developed, we're not going  
9 to deal with that now.

10 Also, the Court received, once again, from Arkansas  
11 counsel for Mr. Moeller, an Emergency Motion for  
12 Appointment of Guardian. Naturally that became Docket 361.  
13 The Court got that one close to noon. We will deal with  
14 that one. Then Exhibits A and B were not attached. They  
15 were subsequently attached, so I've had a chance to go over  
16 those, also.

17 Then at 12:25 today the Court received, once again,  
18 from Arkansas counsel for Mr. Moeller, another Motion to  
19 Strike Untimely Documents, that's what they called them,  
20 that were filed by the State. I refer to the Defendants as  
21 the State. I have identified who all of the Defendants  
22 are, but I'm going to refer to them as the "State."

23 Now, also Attorney Marshall has entered a Notice of  
24 Appearance on behalf of Mr. Moeller in these proceedings,  
25 and Arkansas counsel has resisted that appearance.

1 Mr. Marshall is allowed to appear in this Court, also, for  
2 Mr. Moeller. At the same time the Court is not removing  
3 Arkansas counsel as counsel for Mr. Moeller. So everybody  
4 is on the same page as to where we are with regard to that.

5 Now, as I indicated in the last Order that the Court  
6 entered, the Court is going to question Mr. Moeller with  
7 regard to this dismissal. I'm not going to have  
8 questioning by the lawyers. It will be questioning by the  
9 Court. After I've questioned Mr. Moeller then, then I'll  
10 hear from counsel, their views on how we proceed.

11 One thing, and I mentioned this is now a 1983 action.  
12 There are cases in the posture that we're in right now that  
13 I mentioned. There is Smith vs. Armontrout, 812 F.2d at  
14 1050. It's a 1987 Eighth Circuit decision that applies  
15 Rees vs. Peyton. Rees vs. Peyton is a 1966 United States  
16 Supreme Court decision with regard to the waiver of  
17 post-conviction habeas corpus relief. There's a  
18 distinction there in that post-conviction habeas corpus  
19 relief could result in freedom for somebody. That's done  
20 in this case. That's over with. This is a 1983 action  
21 with regard to method of execution.

22 Just so everybody knows, it's the Court's preliminary  
23 view, and I say "preliminary," because this case has  
24 evolved very recently with the filing of the Motion to  
25 Dismiss. It's the Court's preliminary review that those

1 cases, Smith v. Armontrout and, for that matter, Rees v.  
2 Peyton, are instructive, but not binding, because of the  
3 difference. This isn't a habeas action with the relief  
4 that could come from a habeas action.

5 Armontrout, in Armontrout the Eighth Circuit didn't  
6 decide the burden with regard to the dismissal of a habeas  
7 action. It's my preliminary view that the burden is on the  
8 Petitioner in this civil action, just so everybody knows.

9 All right. Now, with that, Mr. Moeller, I'll ask the  
10 clerk administer an oath or affirmation to you, as you  
11 choose. You can either take an oath or an affirmation.

12 MR. BRADEN: Your Honor, before you begin that, I  
13 would like to note my objection for the record. I  
14 understand you are going to talk to Mr. Moeller. I  
15 understand that you are going to ask him some questions. I  
16 don't believe that he's competent to answer those questions  
17 for a number of reasons. I don't know whether you want to  
18 go into that now or if you want to wait until you are done.  
19 But we object to --

20 THE COURT: Well, he might be interested in  
21 hearing about it. I'm aware of it.

22 MR. BRADEN: Well, first off, the first thing I  
23 would ask, Your Honor, is I would ask that you either lift  
24 the Protective Order in this case or you close this  
25 courtroom. I think presenting this case to you and having



1 to watch the language that we use and the words that we  
2 speak and so forth, because we're under this Protective  
3 Order, even with Mr. Moeller, makes it almost impossible to  
4 effectively argue and present this case to you.

5 THE COURT: Wait a minute. Let's talk about  
6 that. The Protective Order does essentially two things.  
7 One, it protects the identity of the execution team.  
8 That's one thing.

9 The other thing is it also protects the identity of  
10 who it is that supplied the active ingredient for the  
11 pentobarbital.

12 With regard to what we're doing right now, none of  
13 those things have to even be talked about, because we  
14 haven't gotten to that. It does present an issue when we  
15 get to that, but we probably won't get to that today.

16 MR. BRADEN: Well, Your Honor, I disagree with  
17 that. You are going to ask Mr. Moeller here about his  
18 waiver. You're going to ask him about what he wants to do.  
19 That waiver isn't fully informed, because we've done some  
20 depositions. Those depositions are under seal, my  
21 understanding, anyway. We've tried very carefully to  
22 comply with the Court's order. In those Protective Orders  
23 we were specifically told none of this information could be  
24 told to Mr. Moeller. So we haven't informed him of any of  
25 this. So to the extent he's making a waiver of anything

1 today, he's not fully informed.

2 THE COURT: Just a minute. So you can't tell him  
3 who the execution team is. You don't know either, by the  
4 way. You do know who the supplier of the active ingredient  
5 is. But you don't have to tell him that in order for him  
6 to be able to answer my questions.

7 MR. BRADEN: It's my understanding, Your Honor,  
8 from your Protective Order, as I read it, even talking to  
9 Mr. Moeller about the contents of what has happened or  
10 reviewing information inside the depositions was restrained  
11 from being discussed with Mr. Moeller. So we haven't been  
12 able to tell him that.

13 THE COURT: Well, he won't talk to you, anyway.

14 MR. BRADEN: Well, that's not exactly true  
15 either. We visited with him this afternoon in the holdover  
16 and had a lengthy discussion with him about this, which we  
17 felt very constrained because we couldn't go into a lot of  
18 this information. To the extent that he is not fully  
19 informed about this, when we talked with him this  
20 afternoon, he informed me, "What's the big deal? I'm going  
21 to be executed with that drug that killed Michael Jackson,  
22 which is propofol." And we know that's not --

23 THE COURT: Let me ask you. Have you sent the  
24 pleadings that weren't subject to the Protective Order to  
25 him as this has gone along?

1 MR. BRADEN: I believe we have. Sir, I don't  
2 know. I don't do the mail in the office. I think we've  
3 sent him the stuff.

4 THE COURT: But you don't know?

5 MR. BRADEN: No.

6 THE COURT: Well, anything else in your argument?

7 MR. BRADEN: Well, I just don't believe he's  
8 competent to make any sort of waiver of his right to remain  
9 silent or his right to make a choice here. You are going  
10 to ask him about a choice and discuss with him the waiver  
11 of a constitutional right. I believe Mr. Moeller is not  
12 competent to make that choice right now. There's  
13 indication in the record that he has symptoms in his youth  
14 from schizotypal symptoms. It's enough that this Court  
15 should conduct inquiry about his competency before he makes  
16 basically what is the waiver of constitutional rights that  
17 is going to result in his death.

18 THE COURT: Well, in terms of fully advising him,  
19 did you tell Mr. Moeller, when you met with him today, you  
20 filed an Emergency Motion to appoint a guardian for him?

21 MR. BRADEN: Yes.

22 THE COURT: Did you tell him you filed that?

23 MR. BRADEN: I believe we did.

24 THE COURT: Did he agree with that?

25 MR. BRADEN: No, but I've never worked with an

1 incompetent person that believes that they are incompetent.

2 THE COURT: Okay. Anything else?

3 MR. BRADEN: I also believe that the decision he  
4 is making here today that you will be inquiring about is  
5 just not knowing and intelligent -- or not voluntary,  
6 because I think a great deal of that rests on the  
7 conditions that he's lived in for the past number of years  
8 in the Department of Corrections. We've discussed that  
9 some in our pleadings. I think you've seen it. You  
10 mentioned that you read Dr. Haney's Affidavit today.

11 I think what Mr. Moeller here is doing is basically  
12 committing suicide, but he'll have the State do it for him.  
13 I think that results from the conditions of the confinement  
14 in the prison where he's been all these years. It's  
15 detailed in our pleadings.

16 It's equivalent to having a gun at your head and  
17 having to make a decision about what he's doing. He  
18 doesn't want to live in the prison anymore. It's not so  
19 much that he doesn't want to live. He doesn't want to live  
20 in that prison.

21 I think it's significant that this Court should note  
22 the last execution in the state and the three apparently  
23 pending are all volunteers. There's been six people on  
24 death row in this state. Four of them are volunteers, to  
25 the extent we know. Mr. Moeller apparently is. I think

1 that's a significant fact to look at in determining whether  
2 somebody will waive a constitutional right.

3 So we would object to your questioning about that and  
4 allowing him to make this decision now without assessing  
5 that.

6 THE COURT: Well, you are presupposing quite a  
7 bit with regard to both what I'm going to ask as well as  
8 what the Court is going to do. Your motion is overruled.  
9 You may be seated.

10 MR. MARSHALL: Your Honor, may I make a very  
11 brief record, as well?

12 THE COURT: You may.

13 MR. MARSHALL: I appreciate the gravity of this  
14 situation. It's with some reluctance that I want to  
15 correct the record already made. In that you observed that  
16 this was a Motion to Dismiss. This is not a Motion,  
17 Your Honor. It's a Stipulation under Rule 41(a)(1)(A)(ii)  
18 which Mr. Moeller believes is self-executing, that no  
19 ruling is required.

20 I appreciate the Court can make inquiry to satisfy  
21 itself. But we believe with the filing of that  
22 Stipulation, the matter has been dismissed, and all  
23 subsequent filings are nullities.

24 THE COURT: And, frankly, it's interesting you  
25 make that point, because the last thing I did -- actually I

1 was a little bit late coming out here. I thought I'm going  
2 to double-check your filing, because I thought it was a  
3 Rule 41 Motion of that sort, and it is. I looked at that  
4 before when you first filed it. You are technically  
5 correct.

6 However, the Court believes, even though, frankly, you  
7 are technically correct in what you say, Mr. Marshall, the  
8 Court believes it is within the inherent power of the Court  
9 to make inquiry before, under these circumstances, I would  
10 accept the dismissal.

11 So you are technically correct. You can't make me  
12 dismiss it. That's what it boils down to.

13 MR. MARSHALL: And, also, Your Honor, we have no  
14 objection to Mr. Moeller testifying.

15 THE COURT: Go ahead and give the oath.

16 (Defendant, sworn)

17 THE COURT: You may be seated, Mr. Moeller.  
18 What's your full name?

19 THE DEFENDANT: Donald Eugene Moeller.

20 THE COURT: How old are you?

21 THE DEFENDANT: Sixty.

22 THE COURT: Can you hear me clearly?

23 THE DEFENDANT: Yes, sir, I can.

24 THE COURT: At any point if you don't hear some  
25 question that I ask or if you don't understand a question,

1 just say so. I'll either speak up or rephrase it,  
2 depending upon which situation it is.

3 THE DEFENDANT: Thank you.

4 THE COURT: How much formal education have you  
5 had?

6 THE DEFENDANT: GED officially, and I've been  
7 studying since.

8 THE COURT: What have you been studying?

9 THE DEFENDANT: The Bible, the Book of Mormon,  
10 whatever I can get my hands on.

11 THE COURT: Is that while you've been in prison?

12 THE DEFENDANT: Yes.

13 THE COURT: Where have you been housed before you  
14 were brought here this afternoon?

15 THE DEFENDANT: Section A of Jameson, Unit A.

16 THE COURT: And Section A is what?

17 THE DEFENDANT: Administrative segregation.

18 THE COURT: How long have you been there?

19 THE DEFENDANT: In this particular cell? Just  
20 right at three years.

21 THE COURT: Were you in administrative  
22 segregation then before that, too?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: How long have you been in  
25 administrative segregation altogether?

1 THE DEFENDANT: Since I believe August of 1992.

2 THE COURT: Are you taking any medications now?

3 THE DEFENDANT: No, sir.

4 THE COURT: Have you in the past, in the recent  
5 past?

6 THE DEFENDANT: No. Not legal medication. I was  
7 self-medicated on the outside.

8 THE COURT: Was that with some things that maybe  
9 were illegal to take?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: But that was how long ago?

12 THE DEFENDANT: Over 22 years.

13 THE COURT: So as you and I are talking here  
14 today, you're not under the influence of any medications.  
15 Is that correct?

16 THE DEFENDANT: No, sir.

17 THE COURT: Is that correct?

18 THE DEFENDANT: That is correct.

19 THE COURT: Now, as we're speaking today, are you  
20 currently under the care of any psychiatrist or  
21 psychologist?

22 THE DEFENDANT: No, sir.

23 THE COURT: Have you ever been?

24 THE DEFENDANT: The Federal Public Defender had a  
25 guy come talk to me in August of 2011. We talked for four



1 and a half hours over two days.

2 THE COURT: Who was that?

3 THE DEFENDANT: A guy named David. All I know is  
4 he was from Boston. That was about it.

5 THE COURT: Did you ever see a report from him?

6 THE DEFENDANT: No, sir. But Deborah Czuba told  
7 me in September, 2011, that the report from Dave was that I  
8 was not crazy. She told me that.

9 THE COURT: It was what?

10 THE DEFENDANT: I was not crazy.

11 THE COURT: Other than that, have you seen any  
12 psychiatrists or psychologists?

13 THE DEFENDANT: On occasion, I don't know what he  
14 is, there's a head shrinker that walks around and asks how  
15 you are doing, a mental health worker. Sometimes he tries  
16 to give me puzzles or stuff like that. We don't sit on the  
17 couch or nothing like that.

18 THE COURT: For what crime is it you've been  
19 sentenced to death?

20 THE DEFENDANT: I kidnapped, raped, and murdered  
21 Rebecca O'Connell May 5, 1980.

22 THE COURT: Now, you had two trials in State  
23 Court. The first trial was overturned by the South Dakota  
24 Supreme Court, and then you were retried. Is that correct?

25 THE DEFENDANT: Yes, it is.

1           THE COURT: When you were retried then, do you  
2 recall who was your defense lawyer for the second trial?

3           THE DEFENDANT: I had three of them. Michael  
4 Butler of Sioux Falls; David Gienapp of Madison; and  
5 Robert Van Norman from Rapid City.

6           THE COURT: Of course the Court is familiar with  
7 all of them. Were they good lawyers on your behalf or not?

8           THE DEFENDANT: Butler and Gienapp were, yes,  
9 excellent. Van Norman, I didn't really get to know that  
10 guy. He was doing mitigation, and we didn't use  
11 mitigation.

12          THE COURT: I see. Now what's your understanding  
13 of the punishment that the State Court has ordered you  
14 receive for this murder conviction?

15          THE DEFENDANT: The death penalty by lethal  
16 injection.

17          THE COURT: What is your understanding of the  
18 method by which the State is going to execute you?

19          THE DEFENDANT: Sometime after the 28th of  
20 October, I'll be transferred to a holding area in the old  
21 prison hospital at the State Penitentiary, and sometime  
22 later at their convenience, they will take me to a room,  
23 strap me down, and put injections into my arm and kill me.

24          THE COURT: There's a period, I believe, that the  
25 State Court ordered within which you can be executed. They

1 didn't set a specific date. What is that period? Do you  
2 know how long it is?

3 THE DEFENDANT: October 28 until November 3, this  
4 year.

5 THE COURT: Do you want to take anymore legal  
6 action to try to prevent your execution?

7 THE DEFENDANT: No, sir, I do not.

8 THE COURT: Why not?

9 THE DEFENDANT: As I stated just a minute ago, I  
10 killed the little girl. It is just that the punishment be  
11 concluded. I believe that. I believe that as just a plain  
12 old guy. I believe that from my Bible. I think it's a  
13 good thing that the death penalty does inhibit further  
14 criminal acts.

15 THE COURT: This lawsuit, what's left of it that  
16 is pending now before me, what's your understanding of this  
17 lawsuit that is now pending, what's left of it?

18 THE DEFENDANT: Okay. That's a couple different  
19 things. I was told -- can I?

20 THE COURT: Go ahead.

21 THE DEFENDANT: Okay. In January of this year  
22 Deb Czuba and Julie Pitt came up and told me I couldn't  
23 fire them after cert. I told them I didn't want to do  
24 cert. When they did, I said, "Okay, I'm firing you." They  
25 said I couldn't. Julie and Deborah both told me they would

1 do everything they could to stretch out, delay, and harass  
2 the execution. They would not allow it to happen.

3 Again today, this young lady, probably seen her once  
4 before, and now she says she's my lawyer. That's crap.  
5 They just -- that's their agenda; stop, postpone, and  
6 harass.

7 What I want to do here is just stop the Federal stuff.  
8 Once you take the Federal people away from me, the State  
9 can go ahead and do their job, which the jury said is just,  
10 the law says is just, God says is just, and I believe it's  
11 just.

12 THE COURT: Have you talked with the Arkansas  
13 lawyers with regard to the method of execution the State  
14 proposes to use?

15 THE DEFENDANT: They came up to me today and  
16 spent a few minutes with me in the holding cell. They were  
17 saying they couldn't explain it to me because of the  
18 Protection Order and all this crap.

19 The thing is, I know what it is. They are going to  
20 put poison in my veins, and they're going to kill me. It  
21 may take five minutes. It may take 20 minutes. I accept  
22 that.

23 The man there, he said it was just an OD. Actually it  
24 was going to be an OD. I have OD'd before. I am not  
25 scared. So if they are worried about being scared, I'm not

1       scared. I'm not running for it. I wouldn't hang myself.

2       But the law has spoken. I killed. I deserve to be killed.

3               THE COURT: Now, the Arkansas counsel has on your  
4       behalf --

5               THE DEFENDANT: No. Sir, I fired those people.

6       They are only working for their own agenda. I do not  
7       believe they are working for me. I have written them  
8       letters telling them, "You are not my attorneys." They  
9       still come up. I refuse their visits.

10              THE COURT: When did you write them letters  
11       saying they're not your lawyers?

12              THE DEFENDANT: This one I wrote to them May 2nd.  
13       "My dear stepmother must have misunderstood something I  
14       wrote. I do not need or want to see anyone connected with  
15       your office unless you all agree to stop all the legal  
16       activities on my behalf. This is not a move I've taken  
17       lightly. Stop the bullshit really. Moeller."

18              THE COURT: Is that May 2 of this year?

19              THE DEFENDANT: No. Yes. May 2, 1912. I have  
20       other forms here that they know I'm not working for them --  
21       I'm not working with them. If you want to see that, I have  
22       evidence.

23              THE COURT: What do you mean?

24              THE DEFENDANT: This one lawyer, she wrote and  
25       said, "Yeah, I know you're not talking to us, but I took

1 money from your mom and I'm going to send it up." So it  
2 come in under her name, under the lawyer's name. See, it  
3 was from my mother, stepmother actually.

4 THE COURT: Explain that to me a little bit more.

5 THE DEFENDANT: Okay. This was August 14, this  
6 year. This woman, Tonya Willingham, said that, "I'm sorry  
7 you refused our visit this morning. I wanted to make sure  
8 you knew that Tokey had not written or sent money because  
9 she hasn't been feeling well. She wanted to visit you with  
10 me. She's pretty weak and not able to walk the parking  
11 lot. She's also unable to grip a pen. Enclosed some money  
12 from her. She's doing better." It just goes on. As she  
13 said, I refused the visits.

14 THE COURT: That's a letter to you from whom?

15 THE DEFENDANT: From one of them, Tonya  
16 Willingham, Federal Defender. Do you want to see it?

17 THE COURT: Please.

18 THE DEFENDANT: There is another letter from one  
19 of their cronies that says, "I'm not working for you."

20 THE COURT: Just a minute. One at a time here.

21 THE DEFENDANT: Okay. I'm not really crazy.  
22 Just pissed off.

23 THE COURT: "Tokey" is referred to. Is that your  
24 stepmother?

25 THE DEFENDANT: Yes.

1 THE COURT: What's her actual name?

2 THE DEFENDANT: Agnes Becker.

3 THE COURT: So the "\$60 via Tokey," that's  
4 something you wrote here on the bottom of the envelope?

5 THE DEFENDANT: Yes.

6 THE COURT: Since the Court has looked at this,  
7 let me mark the envelope and the letter as Exhibit A, and  
8 then we'll make a copy of this to give to you. Is that  
9 agreeable with you?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: All right. You had something else  
12 you were going to tell me about.

13 THE DEFENDANT: One of their other litigators --  
14 not litigators. One of the lawyers that worked for them,  
15 he had been up about 70 times to see me, and then he said  
16 he quit, that they fired him. He brought my stepmother up  
17 to visit and reported back to them. I just want to show  
18 you that that says he was not working for them, and I was  
19 not meeting with him. It was a visit.

20 THE COURT: Do you recall that lawyer's name?

21 THE DEFENDANT: Tim Semmerling,  
22 S-E-M-M-E-R-L-I-N-G.

23 THE COURT: How many times did he try and see  
24 you?

25 THE DEFENDANT: I actually seen him about 70

1 times, and I refused him I think three times.

2 THE COURT: All right. Let me see that then.

3 THE DEFENDANT: That's back in February there.  
4 So that's a long-running feud. It's on record that I did  
5 not want these people working for me.

6 THE COURT: So this is Tim -- how do you think  
7 the last name is spelled?

8 THE DEFENDANT: I have it right here.  
9 S-E-M-M-E-R-L-I-N-G.

10 THE COURT: Thank you. Is it all right if this  
11 becomes Exhibit B, and we'll make a copy of it for you?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: You say he visited you about 70  
14 times?

15 THE DEFENDANT: About 70 times in two years. His  
16 first visit I believe was in '09.

17 THE COURT: Was he from Arkansas?

18 THE DEFENDANT: Actually he was from Chicago. He  
19 worked at SAGE. They do mitigation, Federal mitigation,  
20 and he was hired by these guys.

21 THE COURT: Was he a lawyer, or was he in some  
22 other capacity?

23 THE DEFENDANT: He was a lawyer. Yes.

24 THE COURT: All right. I have talked about your  
25 relationship with Arkansas counsel.



1           Now, what about with regard to Attorney Marshall?

2           When did you first meet him?

3                   THE DEFENDANT: Oh, man. I have to think back.  
4           As soon as my case went into Federal Court, my State  
5           lawyers, Mike Butler and David Gienapp, turned it over to  
6           Mark. Mr. Marshall was my attorney for about two years, I  
7           believe, and then he took another job and handed me off to  
8           these people.

9                   THE COURT: Now, are you aware that Mark Marshall  
10          and the people representing the State in this action have  
11          entered into an Agreement to Dismiss this Federal Action  
12          that Challenges your Method of Execution?

13                  THE DEFENDANT: Yes.

14                  THE COURT: Now, did Mr. Marshall bring that up  
15          to you, or did you bring it up to him? How did that come  
16          about?

17                  THE DEFENDANT: The Stipulation, you mean?

18                  THE COURT: Well, yes. I mean was it your idea?

19                  THE DEFENDANT: No, that was not my idea, but I  
20          agreed with it the second I heard it.

21                  THE COURT: Well, whose idea was it?

22                  THE DEFENDANT: Mr. Marshall.

23                  THE COURT: Explain that to me.

24                  THE DEFENDANT: It was one of the things we were  
25          talking about, like -- just one of the things that we were

1 discussing, and that was brought up, that it was a  
2 possibility. Did I want to consider it? I said, "Yes, I  
3 did." It's like this. I wanted this to stop. So I said,  
4 "Yes, let's make this Motion."

5 THE COURT: Were you talking about different ways  
6 this Federal lawsuit could be stopped? I mean how did it  
7 come up? That's what I'm trying to understand.

8 THE DEFENDANT: I'm not sure how it come up.

9 THE COURT: How long ago did it come up?

10 THE DEFENDANT: It was just after 9-19 of this  
11 year.

12 THE COURT: After September 19?

13 THE DEFENDANT: Yes, but I couldn't tell you the  
14 date. I don't have Mark's logs. I keep logs of  
15 everything. I know when everybody sees me and everything.  
16 I'm not sure when that day was. I know it was after  
17 Semmerling was here.

18 THE COURT: Now, if this lawsuit that's pending  
19 before this Court, before me, is dismissed, do you know  
20 what the result of that will be?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: What's that?

23 THE DEFENDANT: The State will go ahead and  
24 execute me on or after October 28.

25 THE COURT: Of this year?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: You understand, of course, that the  
3 Arkansas Public Defender's Office does not agree you should  
4 dismiss this action that challenges your method of  
5 execution.

6 THE DEFENDANT: Yes. They also think I'm crazy.

7 THE COURT: They have filed a Motion for the  
8 Appointment of a Guardian Ad Litem. Do you agree with  
9 that?

10 THE DEFENDANT: This is the second time I heard  
11 that, earlier when you first started talking about that.  
12 They never said that when they met with me at the Pen. So  
13 I don't know what this means. A guardian, I know what that  
14 means. But "ad litem," what's that?

15 THE COURT: It means a guardian for purposes of  
16 litigation. They are proposing to have your stepmother  
17 become your guardian ad litem so somebody else can, in  
18 essence, direct your litigation.

19 THE DEFENDANT: Okay. That's a ploy, because  
20 they know she's soft. She's sick. She's 80 years old, and  
21 she doesn't want me to die. So they know they can bully  
22 her. That is exactly what they would do. I don't mean to  
23 holler at her and stuff, but they give her horror stories  
24 about what all this poison would do to me and stuff like  
25 that.

1           THE COURT: You realize the claims that have been  
2 made on your behalf by the people from the Arkansas Public  
3 Defender's Office says, according to their experts, is  
4 there's a high probability the execution won't go smoothly.  
5 Do you understand that? That's what they claim.

6           THE DEFENDANT: I know. That's their agenda.  
7 Anything they can do to hamper, stop, slow down, harass.

8           THE COURT: You understand they also claim  
9 because it won't go smoothly, that you'll be subject to  
10 more than a little pain. Do you understand that?

11          MR. DEFENDANT: Yes, sir, I do.

12          THE COURT: So until today then, I gather the  
13 last person you met from the Arkansas Public Defender's  
14 Office was Deborah Czuba.

15          THE DEFENDANT: Czuba.

16          THE COURT: Czuba. Thank you. Back in January  
17 of this year. Is that correct?

18          THE DEFENDANT: That was the last official one.  
19 This Tim Semmerling, he come up in September of this year.  
20 The first day on the 18th, he brought my stepmother for an  
21 hour visit. He said could he come back tomorrow as a  
22 friend and visit. I said yes. We ended up in the attorney  
23 office, in the attorney's visiting room. That's where they  
24 can't record it. But, again, that was a visit and not a  
25 meeting.

1           THE COURT: Did you talk about legal matters with  
2 him, or was that just a visit among acquaintances?

3           THE DEFENDANT: That was just shooting the  
4 breeze. Like that card, he talks about one thing and  
5 another. How I brought up I taught him how to see the oil  
6 rigs and just stuff like that.

7           THE COURT: You taught him what?

8           THE DEFENDANT: How to recognize oil rigs. See,  
9 he's from Texas, and he didn't know nothing about the oil  
10 fields. So I told him some stuff about that.

11          THE COURT: You worked in the oil fields in  
12 Wyoming. Haven't you?

13          THE DEFENDANT: Yes, sir.

14          THE COURT: Do you still want this Court to  
15 dismiss this lawsuit?

16          THE DEFENDANT: Yes, I do.

17          THE COURT: Why?

18          THE DEFENDANT: Because it's right. A few  
19 minutes ago he said I didn't know, understand what I was  
20 doing, pleading guilty and all this. I was first sentenced  
21 to the South Dakota Penitentiary June 30, 1972. That's a  
22 whole lot of years ago.

23          I know how the system works. I know -- I may not know  
24 your fancy words and all your procedures. But I know  
25 what's going on. I know what my rights are. I also know

1 what's right.

2 THE COURT: You mentioned 1972. That was for  
3 another offense, wasn't it?

4 THE DEFENDANT: Yes, but still I've been dealing  
5 with the Penitentiary, the Court system, since the '70s.  
6 Before '72 actually. I have an extensive juvenile record,  
7 and that was in the late '60s.

8 THE COURT: Has anyone in any way tried to force  
9 you to withdraw this lawsuit?

10 THE DEFENDANT: No, sir.

11 THE COURT: Do you think Mr. Marshall has in any  
12 way tried to get you to go ahead and dismiss this lawsuit?

13 THE DEFENDANT: No, sir.

14 THE COURT: Do you think Mr. Marshall has been  
15 operating in your best interests or not?

16 THE DEFENDANT: Yes, sir. I believe he disagrees  
17 with it. He has told me that he doesn't want me to die.  
18 He always tells me if I ever change my mind, let him know  
19 immediately. One of the first things he says, "Hello. How  
20 are you doing? Have you changed your mind?"

21 Your Honor, even before Mr. Marshall had to give up  
22 this case and go be a Judge, we discussed this right here,  
23 this action, that I was going to stop it. The reason we  
24 didn't at that time was my stepmother was ill, and I didn't  
25 want to add any crap on her. Now I figure she can handle

1 it. I talked to her this morning. She'll be sad, but I  
2 believe she can handle it.

3 THE COURT: Do you have any questions of me?

4 THE DEFENDANT: No, I don't think so.

5 THE COURT: That's a pretty good opportunity, you  
6 know.

7 THE DEFENDANT: Yeah, I know.

8 THE COURT: Any questions I've asked you that you  
9 don't understand?

10 THE DEFENDANT: No. I think there are a couple  
11 you could have asked.

12 THE COURT: Like what?

13 THE DEFENDANT: What I do that makes me consider  
14 myself sane.

15 THE COURT: Tell me.

16 THE DEFENDANT: I watch the news regularly, Brian  
17 Williams, just about every night. I read the Argus Leader  
18 daily. I do the crossword puzzle everyday. I write. I  
19 read.

20 THE COURT: Brian Williams, in addition to the  
21 evening news show, he has another one.

22 THE DEFENDANT: Yeah.

23 THE COURT: Do you ever watch that?

24 THE DEFENDANT: I watch a movie. Station movies.  
25 Turner Classic movies.

1           THE COURT:   There's another show Brian Williams  
2   has once a week.

3           THE DEFENDANT:   30 Rock.

4           THE COURT:   Yes.   Do you see that one?

5           THE DEFENDANT:   No.   I don't watch that one, but  
6   I know what it is.

7           THE COURT:   My son is the news director for that  
8   one.   That's why I was wondering if you were watching it.

9           You said there might be another question I should ask  
10   you.   What's that?

11          THE DEFENDANT:   What my day is.

12          THE COURT:   Go ahead.   Tell me.

13          THE DEFENDANT:   Okay.   I get up always at about  
14   6:00 o'clock when they turn the big lights on.   I turn the  
15   TV on, and I wash my face.   I wait for them to bring my  
16   breakfast.   I clean my house.   I have a top bunk, so I have  
17   to keep that clean.   I dust and I sweep up my floor.

18          Then they come in and do what they call a walk-through  
19   everyday.   They walk in my house, handcuff me.   They bring  
20   me out.   They come in and walk in my house, just to make  
21   sure everything is kosher, and then they lock me up and I  
22   take a nap until lunch.

23          I get up at lunch and see what's on TV.   If there's  
24   nothing on, then I'll listen to the radio until 3:30 when I  
25   get my supper.   About the time Brian Williams comes on,



1 they bring the mail, and that's when I get my Argus Leader.  
2 So while I listen to what Brian is talking about, I do the  
3 crossword. I stay up and watch TV until about midnight.

4 At 12:00 I turn on the radio, turn off the TV and turn  
5 on the radio, because they play an album every night  
6 without any commercials, this radio station I listen to.  
7 So I listen to that. After that I go back to bed.

8 THE COURT: What radio station is that?

9 THE DEFENDANT: KYBB. I think it's 102.7. It's  
10 out of Canton.

11 THE COURT: That's an AM station?

12 THE DEFENDANT: No, it's an FM.

13 THE COURT: What do you read?

14 THE DEFENDANT: I like history, Civil War. I  
15 really like the Civil War stuff. Carl Sandburg's books.  
16 Novels, I like the Graham Greene books. Just anything, but  
17 science fiction. I'm not into science fiction at all.

18 THE COURT: I want to ask you again, even though  
19 I've already asked you. Tell me, why is it that you want  
20 to be executed?

21 THE DEFENDANT: Your Honor, that's a tricky  
22 question, the way you put it there. I don't want to be  
23 executed. I don't want to die. I want to pay what I owe.  
24 I believe the death penalty is just in this case. I told  
25 you twice here today.

1 I've denied it for 20 years. The last couple years I  
2 have accepted responsibility. I did rape and kill that  
3 little girl. I had nobody help me. Nobody forced me. I  
4 wasn't drunk. I wasn't stoned. I just did it bad.

5 The State has a law, and the law says when you do that  
6 evil a thing, you have to pay for it. The Bible says when  
7 you do evil things that bad, you have to pay. I believe I  
8 have to pay.

9 THE COURT: Thank you. Is there anything else  
10 you would like to say?

11 THE DEFENDANT: Even if you can't grant what I'm  
12 asking here today, I would ask you to give me a different  
13 attorney, because these people don't want to work with me.  
14 They only want to do what they want to do. They told me  
15 they will keep fighting. I think they should do what I  
16 want them to do.

17 THE COURT: Let me ask you a question then.  
18 Let's say if you had a choice between getting executed when  
19 it's scheduled now or six months from now, which would your  
20 choice be?

21 THE DEFENDANT: Now. Do you want to know why?

22 THE COURT: Go ahead.

23 THE DEFENDANT: Have you been following the news  
24 where this batter, this guy played for the Cubs one game  
25 and got hit in the head. For two years he was out of

1 baseball. Then the Marlins gave him a chance yesterday.

2 THE COURT: I don't follow baseball.

3 THE DEFENDANT: Anyway, for two years he was  
4 dreaming of it. He got up to the plate, took three swings  
5 and was out. He got it over with. That's it.

6 I've been swinging for 22 years. I've been living  
7 with this, dealing with this, and it's time. Way past  
8 time. If the rape and murder of Rebecca O'Connell does not  
9 deserve the death penalty, then I guess nothing does.

10 THE COURT: All right. Thank you. Now, I'm  
11 going to hear now from counsel as to argument that you want  
12 to make. I'll hear from Petitioner's counsel, to begin  
13 with, Counsel Mr. Braden.

14 MR. BRADEN: Let me just talk about a couple  
15 things that Mr. Moeller mentioned, and then, of course,  
16 I'll certainly address whatever you want me to address.

17 One of the things Mr. Moeller mentioned is the State  
18 has laws. He seeks for the State to carry out these laws  
19 in his way. But the laws of this State, as well as all the  
20 49 other states, are bound by the United States  
21 Constitution. You know that. In that Constitution there  
22 is that Eighth Amendment.

23 That Eighth Amendment forbids this state or any other  
24 state from carrying out a cruel or unusual punishment. The  
25 punishment here, I believe, is cruel, and it certainly is

1 unusual. Because if Mr. Moeller is executed by  
2 pentobarbital that the Department of Corrections or their  
3 agents make, wherever they make it at, and they administer  
4 it to him with contaminated APIs or with the raw chemicals  
5 that they are going to make it with, that will be the first  
6 time I'm aware of that that type of execution is going to  
7 be carried out in the United States. That certainly meets  
8 the unusual.

9 THE COURT: Of course that's kind of getting in  
10 the part we weren't going to talk about, but I understand  
11 why you want to bring it up now.

12 But looking forward, this probably isn't going to be  
13 that unusual, because each time the chemical is turned to,  
14 then the manufacturer, which I'm not critical of them, but  
15 the manufacturer says, "No, we're not going to sell that  
16 chemical for use in execution." It's happened not only  
17 with pentobarbital, but, likewise, Missouri went to yet  
18 another chemical for one drug execution. Same thing  
19 happened. That drug is no longer available, too. We'll  
20 wind up with compounding, unfortunately, it looks like.

21 MR. BRADEN: That may be. But I think what the  
22 United States Supreme Court has told us in Baze is that  
23 what they look at, is there another alternative? I think  
24 what you are talking about in Missouri and what's happened,  
25 there is another alternative. Propofol is a drug that is

1 used by states. So there is a readily available  
2 alternative, as opposed to making the drug here.

3 THE COURT: Just a minute, though. Of course, we  
4 don't have much of a showing with regard to propofol as to  
5 what's available. But the only thing people will be able  
6 to use is stockpiled, because the manufacturer won't sell  
7 it for use in execution.

8 MR. BRADEN: That's a question of fact we should  
9 resolve at a hearing later on, what is available, what  
10 alternatives do we have. Actually, as you say, we kind of  
11 set that to the second part of this hearing to deal with  
12 the summary judgment arguments. But that's a question of  
13 fact that needs to be resolved at a trial, at a hearing  
14 with evidence. The evidence before you in the pleadings in  
15 the Summary Judgment Motions indicates that certainly is a  
16 genuine issue of material fact.

17 But going back to Mr. Moeller and his notion that he  
18 wants the laws to be followed, the Eighth Amendment is the  
19 supreme law of the land. I think we start with that right  
20 there.

21 A couple other things I wanted to mention about  
22 Mr. Moeller and maybe his discussion with you. I noticed  
23 in your conversation with him that you asked a lot of  
24 questions. He answered a lot of questions. He gave you a  
25 lot of detail. The critical things, it seemed to me,

1 anyway, how is he going to die, what's going to happen, he  
2 couldn't answer that. He wasn't able to answer those  
3 questions. That's really what's at stake here today. Not  
4 what's happening on the baseball teams or whatever.

5 Another thing, smart people can be mentally ill.  
6 Smart people can have problems. Mr. Moeller has told you  
7 repeatedly this morning that he has lived in this prison  
8 for 22 years, and for 22 years -- actually longer than  
9 that, because he's been in prison, as he said, since 1972.  
10 He's been in prison, so him making a decision --

11 THE COURT: Well, that was for a different  
12 offense.

13 MR. BRADEN: Right, for a different offense, but  
14 he's been confined since 1972.

15 THE COURT: No, he hasn't been. He was out, and  
16 then he went back.

17 MR. BRADEN: But at least for 22 years he's been  
18 confined for this crime. Again, we're not here, as you  
19 said, as we began this, to determine whether he's guilty or  
20 innocent of this crime. What we are here actually to  
21 determine today his knowledge and his ability to give up  
22 this Eighth Amendment right, not the laws of the State of  
23 South Dakota, but the Eighth Amendment that he has.

24 One other thing briefly. His comment about  
25 Mr. Semmerling, who does happen to be a lawyer. He's not

1 acting as a lawyer in this case or with us, for what it's  
2 worth. He's somebody my office contracts with, because  
3 he's closer to South Dakota and he acts as a litigation  
4 specialist, an investigator. And in this last --

5 THE COURT: I understood that. Actually  
6 Mr. Moeller indicated that.

7 MR. BRADEN: My point is, in this last  
8 conversation he talked about where he and Mr. Moeller had a  
9 visit, and, as he said, they shot the breeze, and I'm sure  
10 they did. Mr. Semmerling reports, and I believe it's in  
11 some of the Affidavits you have, and if you don't have  
12 them, they'll be coming eventually.

13 THE COURT: I suspect.

14 MR. BRADEN: We want the citizens to get their  
15 dollar's worth in the litigation. But in those  
16 conversations Mr. Moeller discussed with Mr. Semmerling his  
17 fears of dying. So we know Mr. Moeller does think about  
18 that.

19 The rest of the stuff I don't need to address unless  
20 you have questions or something you want to ask me about  
21 what Mr. Moeller may have said that you need further  
22 information.

23 THE COURT: I'll probably have some questions.  
24 You haven't been in front of me before. I do ask lawyers  
25 questions. After I hear from the State, I'll probably want

1 to hear from you again. I'm going to ask questions when we  
2 talk over how we're going to proceed.

3 MR. BRADEN: Sure. Addressing the voluntary  
4 dismissal, which I think is what we are really here on  
5 right now and want to discuss, and I'm glad you mentioned  
6 it, because when you talked with Mr. Marshall the terms of  
7 that, that was my opening paragraph. This Court has the  
8 inherent power to go behind any document. First off, that  
9 is a voluntary dismissal, so it has to be voluntary by the  
10 nature of it. The way it's denominated, it means it has to  
11 be voluntary. In this situation I don't think it is.

12 THE COURT: Well, I mean those are filed pretty  
13 commonly in civil cases. But this is not the typical civil  
14 case.

15 MR. BRADEN: Right. And in those cases it's  
16 usually because the parties have settled. They've  
17 exchanged money. They've resolved a contract dispute or  
18 something like that. That's not what's happening here.

19 This voluntary dismissal is, in effect, a waiver of  
20 his Eighth Amendment right and his waiver of due process  
21 rights in the way the State will carry out the execution.

22 Another thing that I think is interesting, and some of  
23 this came from Mr. Moeller, is he says that he talked with  
24 Mr. Marshall on the 19th of September about this, but for  
25 one thing, Mr. Marshall was not even under the Protective



1 Order of this Court, for what it's worth, until the 28th of  
2 September, and didn't even enter an appearance in this  
3 Court until the 2nd of October, until two days ago.

4 One hour after that or less, Mr. Marshall filed this  
5 voluntary dismissal. I think it's clear, from just looking  
6 at the records in the case and the way it's happened, that  
7 Mr. Marshall has been working with the State to prevent  
8 this Court --

9 MR. MARSHALL: Your Honor, I object to the  
10 reference that I am working for the State. That is  
11 entirely unfounded. There is no factual basis for it, and  
12 I would ask the comment be stricken.

13 THE COURT: Well, counsel can make their  
14 argument. I would note there is no basis for it. But  
15 counsel can make their argument.

16 MR. BRADEN: Well, I think part of the basis,  
17 Your Honor, is we need a hearing on this, as we've  
18 mentioned in some of our pleadings.

19 THE COURT: That means you don't have any basis  
20 now.

21 MR. BRADEN: Well, because I think this Court  
22 needs to inquire. The Court has the ability, as you  
23 mentioned, to inquire behind this document to see what  
24 happens.

25 We know that several weeks ago or a couple months ago

1 Mr. Marshall talked to lawyers in my office, actually  
2 Jennifer who is here with me, and he expressed concern  
3 about Mr. Jackley calling him and asking to take over this  
4 case, and thought it was an effort to cut us out. Things  
5 have gone differently since then, so now Mr. Marshall has  
6 filed this document to dismiss this case and bring this to  
7 an end.

8 Mr. Marshall couldn't have explained all of the  
9 details of this. For one thing, as the Court has  
10 mentioned, there's been a lot of filings in this case. We  
11 filed a lot of paper on this. On the 28th of September  
12 this Court allowed Mr. Marshall to see this stuff, to be  
13 part of this Protective Order. Assuming he's read  
14 everything and gone through everything, within four days  
15 he's in this Court seeking to dismiss the lawsuit.

16 There are Affidavits from doctors and chemists in this  
17 case that make my head spin. It's very difficult for me to  
18 understand it. I've been doing this case for a year. I  
19 find it really hard to believe that he has a full  
20 understanding of what was going on in this case and the  
21 subtle issues that has happened here in four days. Maybe  
22 he has more experience in this stuff than I do.

23 But I believe that this Court needs to inquire behind  
24 that. The only way we can get to that is with discovery.  
25 So I do think there's a bit of a basis. It just needs to

1 be flushed out. There needs to be more of a basis to help  
2 this Court in its inquiry.

3 I just don't believe Mr. Marshall is acting as a  
4 proper agent for Mr. Moeller. I think he's conflicted. I  
5 also know, and if you look at Document 300 in this case,  
6 there's a letter, I forget what the document is, where  
7 Mr. Marshall talks about where he or somebody -- or he's  
8 going to represent Mr. Moeller's estate or he's going to  
9 represent the personal representative of Mr. Moeller's  
10 estate. So he has a continuing interest in this case after  
11 Mr. Moeller dies. I just believe these conflicts that lay  
12 upon him create such a conflict that he's not able to bind  
13 Mr. Moeller with these pleadings.

14 All of that being said, and to get to something I  
15 talked briefly about before you started talking with  
16 Mr. Moeller, is I just don't believe Mr. Moeller is capable  
17 of making this waiver, which is what it is, the waiver of  
18 his Eighth Amendment right, via this Motion to Dismiss, for  
19 three basic reasons.

20 I just don't think it's knowing and intelligent.  
21 Mr. Moeller doesn't understand this. He doesn't understand  
22 how he's going to be executed, as I say. Even this  
23 afternoon he talked about how they were going to use the  
24 drug that killed Michael Jackson on him, and we just know  
25 that's not true.

1           So he doesn't have an understanding of all the details  
2           that we know from all the depositions and all the pleadings  
3           and all the Affidavits from the doctors in here and the  
4           scientists who discuss in detail suppliers.

5           And I think it's very interesting in this morning's  
6           newspaper, just in this morning's newspaper, there is a  
7           whole -- I don't know what word -- I don't want to sound  
8           too overly dramatic, but there's a crisis now dealing with  
9           compounding pharmacists on the east coast. Four people  
10          have died because of compounding pharmacists. Pharmacists  
11          didn't make a proper sterile drug, and people are dying and  
12          suffering from that.

13          I think that once the Court has a chance to inquire,  
14          and I believe I'm a little constrained in going into some  
15          of the details, because a lot of the parties that are  
16          happening in that are part of this Protective Order, but I  
17          believe the Court will see that there are serious questions  
18          with compounding pharmacists that spill into today.

19                 THE COURT: I've read everything you've filed on  
20          that. It isn't a matter of me seeing it subsequently.  
21          I've read everything, reread in some instances.

22                 MR. BRADEN: We know the active ingredient in  
23          this case is contaminated. The dispute here seems to be  
24          now, well, can we get that contaminate out? Can we get  
25          that out of that active ingredient? We have serious

1 experts here that say that can happen, and that the State  
2 is not going to use the proper way to do that. But we'll  
3 deal with that if we get to the summary judgment stuff.

4 As I say, I just don't think Mr. Moeller is competent  
5 to make this waiver. Even though he talks clearly and  
6 concisely here, talks about books he's read, as we all  
7 know, smart people have mental health problems. I think  
8 the Court has an obligation to conduct a more full inquiry  
9 to allow us to let experts on the stand to present  
10 testimony about that.

11 Thirdly, I just don't think this waiver is voluntary  
12 because of his 22 years that he's lived in this prison. He  
13 said here today. "I don't want to die. I don't want to  
14 die. I just want to receive the punishment. I want the  
15 law of the state to be followed."

16 He seemed to not want the Federal law followed, which  
17 is the Eighth Amendment, but it seems to me that is more of  
18 a catch phrase on his part to just say, "I just want to  
19 die." Basically what he's saying is, "It's not that I want  
20 the laws to be followed. I just want to die."

21 One has to wonder why does he just want to die? I  
22 think at a full hearing we can present conditions that he's  
23 lived in for 22 years and present evidence. One thing I  
24 pointed to and continue to point to is the number of people  
25 in this prison that are asking to be executed or have asked

1 and actually have been executed, I think it's significant.

2 THE COURT: It's one so far.

3 MR. BRADEN: Yes, sir, one. One person, but you  
4 have to look at your totals here. There are six people  
5 here as opposed to 400 in California or whatever.  
6 Statistically if you look at it, over 50 percent of the  
7 people that have been on South Dakota's death row have  
8 asked to be executed, or "volunteering" is kind of the  
9 shorthand term. I just don't think that's a voluntary  
10 decision on Mr. Moeller's part, partly because of the  
11 conditions and the way he lives.

12 THE COURT: Of course in terms of the execution  
13 world, so to speak -- I served -- one of the cases talks  
14 about, you know there was the 1989 Powell Commission, the  
15 Ad Hoc Commission for the Judicial Conference of the United  
16 States. Retired Justice Powell sat as the chair. They did  
17 that.

18 Then there was a subsequent one, another Ad Hoc  
19 Committee for State Capital Habeas in Federal Court. That  
20 one I sat on as a representative of the Executive Committee  
21 at the Judicial Conference. It just ended about a year and  
22 a half ago.

23 One of the things we found was -- because you used  
24 California as an example, and they have all kinds of people  
25 on death row, but California doesn't execute. That's the

1 result, because there's about 30 some states that have  
2 capital punishment laws. Some of the states are states  
3 that execute. Others are ones that don't.

4 The ones that do, one can probably see why some people  
5 might, for a variety of reasons, wish to go ahead with  
6 their execution. In a state like California, it seems to  
7 me if you know you aren't going to get executed, even  
8 though you are on death row, there's less reason to ever  
9 volunteer. There are a lot of your articles that deal with  
10 that, since you talked about California.

11 MR. BRADEN: I suppose that could be true,  
12 Your Honor, but I definitely think that's an area of  
13 inquiry. When you look at the prison, the conditions here  
14 -- I shouldn't even be talking about this because I've not  
15 been to -- this is why we need a hearing on this.

16 He's kept in a cell 24 hours a day, except for these  
17 occasional visits when he comes out to see Tokey, his  
18 stepmother, or somebody from our office when he does come  
19 out, or Mr. Marshall occasionally now, and with a plastic  
20 cover over his door, as I understand it. He doesn't leave  
21 for recreation. You've read this in the Affidavits that  
22 we've submitted, so you understand it. That's the way he  
23 lives day in and day out. Not in a situation where he gets  
24 yard. Partly it's because he doesn't choose to do that.

25 But, again, in the Affidavits we presented, to do that

1 he goes through this humiliating process of getting  
2 escorted to go out or people jeering at him on a dog lead  
3 and so forth, and I think 22 years of that would wear on  
4 somebody.

5 Particularly, again, if you look at the Affidavits we  
6 submitted, Mr. Moeller I think went in with preexisting  
7 problems, to begin with, into this solitary confinement  
8 world. He's lived a difficult upbringing that I think  
9 makes one prone to problems like that.

10 So, suffice it to say, this is a suicide effort. It's  
11 made for a variety of reasons, and I think partly because  
12 of the conditions in the prison, but this is something we  
13 need to have a more full inquiry about with a hearing.

14 I think that's all -- may I have just one minute to  
15 consult with my co-counsel?

16 THE COURT: Certainly.

17 MR. BRADEN: One thing, stepping back a little  
18 bit. One thing Mr. Moeller mentioned earlier when you  
19 asked him if he was on drugs or medication, and he  
20 mentioned that he had been on illegal drugs when he was not  
21 in prison. Even he recognized in what he said, I could be  
22 wrong, but I think it was Mr. Moeller that said, "Yes, I  
23 was on illegal drugs. I was self-medicating."

24 Well, what was he self-medicating himself for? I  
25 think he was self-medicating himself, because he knows he



1 had mental health problems in the world outside of the  
2 prison. The mental health problems inside the world of  
3 prison are different. If he was self-medicating himself,  
4 he was self-medicating for some reason.

5 I don't have any other comments on this, except we  
6 certainly will address the Motion for Summary Judgment,  
7 should we get there.

8 THE COURT: You brought up and kind of tried to  
9 paraphrase this Document 300. I think that you brought it  
10 up. I had it brought up, and this is a letter from  
11 Attorney Marshall to this Court dated August 6 of 2012.  
12 This is Document 300. I'll just read it into the record,  
13 so we don't have any misunderstanding what it says.

14 "Dear Judge Piersol: The state circuit court  
15 appointed me to represent Donald E. Moeller with regard to  
16 matters surrounding his execution. A copy of the order  
17 appointing me is enclosed for your information." It's  
18 attached to the letter.

19 "While I do not represent Don in the above matter,"  
20 that's referring to this lawsuit, "I have nevertheless met  
21 with him in prison four times in the past few weeks.  
22 During these meetings Don talked at length with me about  
23 his federal civil rights claim. He asked that I convey the  
24 following information to you." That would be to me.

25 "Don prefers that the case proceed to a final

1 decision. He believes that a condemned person enjoys a  
2 right to have a death sentence carried out in a manner  
3 that's consistent the federal and state constitutions." I  
4 think "with" should be in there. "Nevertheless, Don  
5 strongly prefers that nothing be done to delay his  
6 execution. Don asks that this Court not to stay his  
7 execution. Don also asked me to call to your attention  
8 that he has not authorized anyone to seek a stay or any  
9 form of executive clemency on his behalf.

10 "Don believes that the civil rights action, if pending  
11 at the time of his execution, will survive his death. Don  
12 signed a last Will and Testament and provided the named  
13 personal representative with directions concerning his  
14 wishes with regard to his civil rights claim.

15 "Sincerely," signed by "Mark Marshall."

16 That's what was on the record. I had that filed so it  
17 was on the record.

18 Anything else?

19 MR. BRADEN: No, sir. Thank you.

20 THE COURT: Thank you. I'll hear from the State.

21 MR. JACKLEY: Thank you, Your Honor. Your Honor,  
22 I believe this record establishes a knowing, voluntary, and  
23 intelligent decision by Donald Moeller to stop further  
24 legal proceedings. I, therefore, am requesting this Court  
25 to allow the Rule 41 Stipulated Motion for Dismissal to

1 Self-Execute.

2 I will assure this Court that Mr. Marshall is not an  
3 agent of the State and is not working for the State. He  
4 appears to following out the responsibilities of carrying  
5 out his client's wishes consistent with Rule 1.2 of the  
6 Rules of Professional Responsibility.

7 The reason I state that I believe this is a knowing  
8 and voluntary stoppage of further legal proceedings is  
9 based upon the legal standard of competency. The Court  
10 earlier talked about the Rees decision, and I agree with  
11 the Court's analysis. I cite Rees for the purpose of what  
12 the standard is in determining competency.

13 What the Rees Court said is a competent person "has  
14 capacity to appreciate his position and make a rational  
15 choice with respect to continuing or abandoning further  
16 litigation." Cited U.S. at 314. And I believe that's  
17 happened today.

18 Conversely, what the Rees Court indicates is an  
19 incompetent person "is suffering from a mental disease,  
20 disorder, or defect, which may substantially affect his  
21 capacity in the premises." Again at Page 314. And I don't  
22 believe that's been demonstrated today, and I believe, in  
23 fact, the colloquy between the Court and Mr. Moeller would  
24 indicate that he is clearly competent.

25 I would further cite the Godinez v. Moran case at

1 509 U.S. 389, Page 402, a 1993 Supreme Court case, for the  
2 proposition, "A competency determination is necessary only  
3 when a Court has reason to doubt the Defendant's  
4 competence." I don't believe it's been demonstrated that  
5 there is that reason existing here today.

6 Finally, I would cite the Whitmore v. Arkansas Supreme  
7 Court decision at 495 U.S. 149 at Page 165. It's a 1990  
8 Supreme Court case, where the Court declined to find that,  
9 "A hearing on mental competency is required by the United  
10 States Constitution whenever a capital Defendant desires to  
11 terminate future proceedings."

12 Your Honor, in trying to grasp and gain a better  
13 appreciation of what was going to happen today, I saw the  
14 words of the Kentucky Supreme Court that I think sheds  
15 light on what has occurred. What the Kentucky Supreme  
16 Court said in Chapman v. Commonwealth, 265 S.W.3d 156,  
17 Pages 175 to 76, it's a '97 Kentucky case, "Adhering to a  
18 Defendant's choice to accept the death penalty honors the  
19 last vestiges of personal dignity available to such a  
20 Defendant."

21 Your Honor, I believe Donald Moeller has made a  
22 knowing, voluntary, and intelligent decision. I further  
23 believe he accepts the execution as a consequence of his  
24 actions, and would request, again, that this Court would  
25 allow the Rule 41 Stipulation to be self-executed. Thank

1     you, Your Honor.

2                 THE COURT:   Mr. Braden?

3                 MR. BRADEN:   Well, Your Honor, to a certain agree  
4     I agree with Mr. Jackley.   It doesn't happen very often in  
5     my business that I agree with the other side.   It does have  
6     to be a rational choice.   It's not a rational choice.

7                 When I went to see Mr. Moeller today and talk to him  
8     in the lockup or the holdup back here, the Marshals Office  
9     was very nice and let us in there, he said, "What's the big  
10    deal?"   I can't remember his exact words, and I'm not  
11    trying to put words in his mouth.   The gist of what he said  
12    was, "What's the big deal?   I'm going to be executed with  
13    those drugs that killed Michael Jackson."   We said,  
14    "Propofol?"   Jennifer, my co-counsel, said, "You mean  
15    Propofol?"   He said, "Yes."

16                That's not what's happening here, so this isn't a  
17    rational choice.   He doesn't understand what's happening  
18    here, and he doesn't understand what he's giving up.   He  
19    may say he wants to be executed because he's following out  
20    the laws of the State of South Dakota, but I just find it  
21    hard to believe that the State of South Dakota wants to  
22    execute somebody that doesn't understand how they are being  
23    executed and what's happening here.   He hasn't made a  
24    rational choice.

25                As far as the question whether there's been sufficient

1 evidence here to prove that he meets this Rees vs. Peyton  
2 standard, we have presented evidence to you. We have  
3 presented evidence to you by affidavit. We presented  
4 evidence from several doctors that talked about trauma.  
5 They talked about his background. We believe there is  
6 evidence here that requires further inquiry by this Court  
7 into Mr. Moeller's capacity to make these decisions.

8 THE COURT: I don't have several doctors. What I  
9 have from you is Exhibit A, Docket 364-1, which is from  
10 Craig Haney, who is J.D., Ph.D. in psychology, M.A. in  
11 psychology, undergraduate from the University of  
12 Pennsylvania. He is not a medical doctor, but he is a  
13 Ph.D., however. That's what I have, which I've read, that  
14 you submitted. All right. Thank you.

15 MR. BRADEN: Anyway, we would ask you to strike  
16 this Motion -- this voluntary dismissal, and at least go  
17 behind it and inquire why and how it was made. Thank you,  
18 Your Honor.

19 THE COURT: Mr. Marshall?

20 MR. MARSHALL: May I be heard, Your Honor?

21 THE COURT: You may.

22 MR. MARSHALL: May it please the Court, counsel,  
23 Mr. Attorney General.

24 I noted that the Court conducted an inquiry that  
25 seemed to track SDCL 23A-2A-22. That is the statute which

1 defines competency to be executed in South Dakota. The  
2 burden that statute places is low. The burden simply is,  
3 is the Defendant aware of an impending execution and does  
4 he know the reason for it? That's clearly the case here.  
5 Don knows there's an execution pending. He knows and  
6 accepts that the execution is pending because he raped and  
7 murdered a nine-year-old girl.

8 Aspersions have been cast on me for my role in this,  
9 and I accept those. I was appointed by the State Court to  
10 represent Don. In the course of that representation, Don  
11 told me he wanted to stop this lawsuit. I believed it was  
12 my obligation to do what I could to carry out his wishes.

13 Today Don has told the Court and provided evidence  
14 that he has tried to discharge his lawyers from the  
15 Arkansas Public Defender's Office in writing, and they have  
16 refused to do that. They refuse to acknowledge his wishes.  
17 And now several months after that, they've decided they  
18 might need a guardian ad litem. They've been making these  
19 decisions all along without his input, without his  
20 approval, without his consent.

21 I think this case is best summarized by an anecdote,  
22 and I beg the Court's indulgence. I was taught about  
23 client relationships by Joe Butler, a man this Court knows  
24 both as a friend, as an adversary. Early in my practice  
25 Joe told me about a circumstance where Joe and Hub Fellows

1 had settled an arm-off case, a railroad case. As they  
2 would want to do at that time, they called the client into  
3 the conference room at the office and divided the proceeds  
4 of the settlement in cash. So Hub had a stack of hundred  
5 dollar bills. He started out, "Here is one for you, one  
6 for me, one for you, and one for me." He got down to the  
7 last dollar bill, Your Honor, and Hub, the Plaintiff's  
8 lawyer that he was, put it on his own stack. The client  
9 looked at him and said, "You know, Hub, that one is mine.  
10 After all, it was my arm."

11 Here I think the Arkansas Public Defender has  
12 forgotten, if you follow the analogy, whose arm it is.  
13 This is Don Moeller's case. He's made the decision to  
14 dismiss it, based on advice of counsel giving him a way to  
15 carry out his wishes.

16 I would ask the Court to accept that Stipulated  
17 Dismissal and not address any of the other pending motions,  
18 because they were filed at a point after which this case  
19 was effectively dismissed.

20 The reason for that is practical, Your Honor. Those  
21 Motions, particularly the Amended Emergency Motion to  
22 Dismiss, cite Rules 59 and 60. Their goal, I believe, is  
23 to create an appealable order to try to further slow down  
24 this execution. That is not what Don wants. He simply  
25 wants his Stipulation acknowledged and this matter closed.



1 Thank you for allowing me to be heard, Your Honor.

2 THE COURT: Thank you.

3 MR. MARSHALL: Have you any questions of me?

4 THE COURT: No. Anything from anybody else?

5 THE DEFENDANT: May I?

6 THE COURT: You may.

7 THE DEFENDANT: One. He said I talked about the  
8 drug that killed Michael Jackson. It was just schematics.  
9 I made a mistake on the drug. I'm not a chemist. I know  
10 the stuff is poison. I know it's going to kill me, no  
11 matter what you call it.

12 Two. He said something about self-medication. That's  
13 a buzz word, self-medication. I got drunk. I got stoned.  
14 Self-medication.

15 Judge, I know what's happening. I am competent. I  
16 don't want this to drag through the Courts anymore, because  
17 there's no reason to do it. It's been judged. Let's do  
18 it. Thank you.

19 THE COURT: I, of course, have thought a lot  
20 about this in anticipation of this hearing. Of course one  
21 of the things about the law is you don't know what's going  
22 to happen at the hearing.

23 This Court has never heard from Mr. Moeller, much less  
24 asked Mr. Moeller a lot of questions.

25 The Court wants a bit of time, which it can grant

1     itself and will, to decide what the outcome of this hearing  
2     will be.

3           I'm not going to hear argument this afternoon with  
4     regard to the various Motions for Summary Judgment,  
5     Cross-Motions for Summary Judgment and so on with regard to  
6     the questions that I outlined I wanted to hear from counsel  
7     on, as well as other issues they would have wanted to argue  
8     on, ex post facto issues, administrative law issues. Some  
9     of those are law questions which I have ready answers for.  
10    But I'm not going to hear argument on that today, because  
11    there are two possibilities without regard to those issues.

12           One is that the Court -- does the Court find that it  
13    would be a knowing and voluntary waiver on the part of  
14    Mr. Moeller, and that would be the end of it.

15           The other would be that the Court feels we should  
16    proceed further before the Court makes that final  
17    determination. That's with regard to the 1983 action with  
18    regard to the Eighth Amendment and Equal Protection claims  
19    that have been made.

20           So with regard to the first part, that is, whether or  
21    not to accept the Rule 41 dismissal, the Court is going to  
22    take that under advisement and shortly issue an opinion.  
23    With that, we're going to be in recess.

24           Anything further from the Petitioner?

25           MR. BRADEN: Just for the record, on the

1 assumption if the Court does sustain the voluntary  
2 dismissal, the Rule 41 dismissal, we would like an  
3 opportunity at that point to make an offer of proof about  
4 what we could have shown and what we would show in the  
5 Summary Judgment argument. I suppose we could do it on  
6 paper. It has been fully hashed out, as you're aware. But  
7 we certainly would like an opportunity to make some offer  
8 of proof at that point.

9 THE COURT: I understand the request. Anything  
10 further from anybody else?

11 MR. MARSHALL: I'm sure Your Honor will  
12 understand this response. We believe that would be a  
13 nullity if it happens after the Court accepts the  
14 Stipulation of Dismissal, because at that point there is no  
15 longer jurisdiction.

16 MR. JACKLEY: The State would concur with  
17 Mr. Marshall's statement on that, Your Honor.

18 THE COURT: Very well. Thank you. We're in  
19 recess.

20 (End of proceedings at 3:07 p.m.)  
21  
22  
23  
24  
25

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF SOUTH DAKOTA :SS CERTIFICATE OF REPORTER  
3 SOUTHERN DIVISION

4 I, Jill M. Connelly, Official United States  
5 District Court Reporter, Registered Merit Reporter,  
6 Certified Realtime Reporter, and Notary Public, hereby  
7 certify that the above and foregoing transcript is the  
8 true, full, and complete transcript of the above-entitled  
9 case, consisting of Pages 1 - 59.

10 I further certify that I am not a relative or  
11 employee or attorney or counsel of any of the parties  
12 hereto, nor a relative or employee of such attorney or  
13 counsel, nor do I have any interest in the outcome or  
14 events of the action.

15 IN TESTIMONY WHEREOF, I have hereto set my hand  
16 this 9th day of October, 2012.

17 /s/ Jill M. Connelly

18 

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